SUPREME COURT OF THE UNITED STATES.

No. 314.—October Term, 1931.

Realty Acceptance Corporation, Petitioner, *vs.* Henry G. Montgomery.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[February 15, 1932.]

Mr. Justice Roberts delivered the opinion of the Court.

The petitioner complains of two orders entered by the Circuit Court of Appeals, one which reversed an order of the District Court setting aside a judgment entered at an earlier term and granting a motion for new trial for the purpose of considering certain newly discovered evidence as to damages, and the other, which vacated its own order previously entered dismissing an appeal from the same judgment and remanding the cause so that the District Court might, in the exercise of its discretion, grant such new trial.

At the March term, 1929, respondent recovered judgment against petitioner for the breach of a contract of employment. An appeal was perfected to the Circuit Court of Appeals, was heard in that court subsequent to the expiration of the term of the District Court, and resulted in an affirmance. Petitioner filed a motion for rehearing, and before disposition thereof presented a petition setting forth that at trial the respondent had failed to disclose certain earnings of which he had been in receipt which should have been taken into account in mitigation of damages; that these facts had been discovered after appeal from the judgment; that the mandate of the Court of Appeals should be stayed to afford the District Court opportunity, if it thought proper, to request the return of the record so that the judgment could be opened and, if justice should so require, a new trial be granted on the issue of the *quantum* of damages. This petition was granted, respondent applied to the District Court, and that court requested the Court of Appeals to return the record for the purpose mentioned. There-

upon the latter court made an order vacating its affirmance of the judgment and dismissing the appeal, thus returning the record to the District Court, which then entertained a motion for a new trial, found the evidence newly discovered within the applicable rule of law, set aside the judgment, and granted a new trial. Respondent then appealed to the Circuit Court of Appeals, assigning this action as error. The latter court held that except for its own orders the District Court would have been without authority to set aside the judgment after the term had expired; that no additional power had been conferred upon the trial court by the previously recited orders in the appellate proceedings; and that there had been error in dismissing the first appeal. Accordingly it reversed the District Court's order granting a new trial, revoked its own order dismissing the first appeal, overruled the petition for a rehearing therein, and reinstated the order affirming the original judgment of the District Court.

The petitioner concedes the District Court lacked power to set aside its judgment after the expiration of the term for the purpose of hearing newly discovered evidence (*United States* v. *Mayer*, 235 U. S. 55, 67; *Delaware, L. & W. R. R.* v. *Rellstab*, 276 U. S. 1); it admits the Circuit Court of Appeals has no original jurisdiction, and possesses only such appellate jurisdiction as is conferred by statute. *United States* v. *Jahn*, 155 U. S. 109, 112; *Whitney* v. *Dick*, 202 U. S. 132; *United States* v. *Mayer, supra.*

But the claim is that § 701 of the Revised Statutes, which defines our appellate jurisdiction, and is made applicable to the Circuit Courts of Appeal by the Act of March 3, 1891, c. 517, § 11, 26 Stat. 829 (see *Ballew* v. *United States*, 160 U. S. 187), authorizes those courts, in the proceeding in error, to set aside a judgment and receive additional evidence, if justice so requires, and that such power may also be exercised by remanding the cause to the trial court for similar proceedings. The section is copied in the margin.*

*The Supreme Court may affirm, modify, or reverse any judgment, decree, or order of a circuit court, or district court acting as a circuit court or of a district court in prize causes, lawfully brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require. The Supreme Court shall not issue execution in a cause removed before it from such courts, but shall send a special mandate to the inferior court to award execution thereupon.

Stress is placed upon the point that in addition to mere power to affirm, reverse or modify, jurisdiction is given in the alternative to order such judgment to be rendered or such further proceedings to be had by the inferior court as the justice of the case may require. From this the conclusion is that though no error appears in the record justifying a modification or reversal the appellate court may, if justice so demands, take further proof which the trial court would be powerless to receive because its term has ended, and on the basis of such proof reverse or modify the judgment. In addition the contention is that though there be no error upon the face of the record the section authorizes its return to the lower court for the opening of the judgment and reception of newly discovered evidence.

The section has been construed as applying to cases where a judgment or decree is affirmed upon appeal and further proceedings in the court below are appropriate in aid of the relief granted. And the statute warrants the giving of directions by an appellate court for further proceedings below in conformity with a modification or a reversal of a judgment where, in consequence of such action, such proceedings should be had. *Insurance Co.* v. *Piaggio,* 16 Wall. 378; *Little Miami &c. R. R. Co.* v. *United States,* 108 U. S. 277, 280; *Fort Scott* v. *Hickman,* 112 U. S. 150, 165; *Pullman Car Co.* v. *Metropolitan Ry.,* 157 U. S. 94, 112; *United States* v. *Eaton,* 169 U. S. 331, 352; *Camp* v. *Gress,* 250 U. S. 308, 318; *Cole* v. *Ralph,* 252 U. S. 286; *Kendall* v. *Ewert,* 259 U. S. 139. *Ballew* v. *United States, supra,* on which petitioner relies, went no farther than this, for there a judgment was reversed in part. Nothing was there said to indicate that this court would order further proceedings below to attack or set aside a judgment entered on a record which disclosed no error calling for a modification or reversal. No authority is cited in which R. S. 701 has been construed as extending this court's powers in the manner for which petitioner contends. *Roemer* v. *Simon,* 91 U. S. 149, is to the contrary. The holding was that upon an appeal in equity this court could not upon motion set aside the decree of the court below and grant a rehearing, and could not receive new evidence; and, further, that as the court below was without power to grant a rehearing after the term at which the decree was entered the remanding of the cause for such purpose would be useless. The opinion

defendant relies. In none of the later cases of the group do we find any reference to the decision of this Court in *United States* v. *Mayer;* nor do any of said cases refer to *Roemer* v. *Simon,* or to the many other decisions of this Court holding that federal trial courts are without jurisdiction to vacate their own judgments after the expiration of the judgment term.

In view of the importance of the question involved, we call attention to *Levinson* v. *United States,* 32 F. (2d) 449, not cited by defendant, in which the Circuit Court of Appeals for the Sixth Circuit in a criminal case granted defendant's motion to permit the District Court to entertain a motion for a new trial on newly discovered evidence. In its opinion the court did not consider the question of the expiration of the judgment term, and held that the District Court had lost jurisdiction because of defendant's appeal which was promptly taken. If the judgment term had not in fact expired, then the District Court after remand clearly would have jurisdiction. The opinion, however, does not disclose whether or not the judgment term had expired.

In *Vause* v. *United States* (unreported to date), in which this Court recently denied certiorari to review judgments of conviction under the federal mail fraud statutes, the Circuit Court of Appeals for the Second Circuit, on December 21, 1921, by a divided court, denied defendant's petition for leave to apply to the District Court for a new trial on newly discovered evidence. The majority of the court in referring to the various authorities on the question of jurisdiction, including the case at bar as pending on certiorari, held that as the motion was denied on the merits the question of jurisdiction became academic.

In *Silva* v. *United States,* 38 F. (2d) 465, the late Circuit Judge Dietrich, writing for the Circuit Court of Appeals for the Ninth Circuit, although denying on the merits defendant's petition in a criminal cause for a new trial

on newly discovered evidence, clearly indicated his doubt, in view of this court's decision in *United States* v. *Mayer, supra,* of the power to remand for such a purpose. It is clear on principle, we submit, that the pendency of the appeal did not keep alive the jurisdiction of the District Court after the expiration of the judgment term, and the only action that could properly be taken by the District Court or that could be directed to be taken by the Court of Appeals would be to carry out the decision of the Circuit Court of Appeals affirming, reversing or modifying, in the exercise of its exclusively appellate jurisdiction, the judgment appealed from. There is, we have seen, no statutory jurisdiction in the District Court to vacate its own judgment after the expiration of the judgment term, nor is there any statutory sanction for a remand by a Circuit Court of Appeals of a cause pending before it on appeal to permit a District Court to exercise a jurisdiction which it did not otherwise possess.

There is no basis for defendant's contention that Section 701 of the Revised Statutes (Title 28, Section 876 U. S. C. A.) affords statutory sanction for the order of remand, which the Circuit Court of Appeals has itself since vacated by its order of July 6, 1931. The provision that the appellate court "may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require," is, manifestly, a power which is incident to and dependent upon the exercise of the appellate power to "affirm, reverse or modify" judgments as therein provided.

This is clear from the decision of this court in *Ballew* v. *United States,* 160 U. S. 187, upon which petitioner relies (Brief, pp. 12-13). There a judgment of conviction based upon a general verdict of guilty after trial of an indictment containing two counts was *reversed* by this court because of certain errors committed by the lower

adds that if the term had not expired the appellate court might, a proper case, upon request of the court below, return the reco for the opening of the decree and for rehearing.

In the present case there is a further conclusive reason why t remission of the cause to the District Court was ineffective give authority to hear the motion to set aside the judgment. Up the original appeal the Circuit Court of Appeals found no error the record and affirmed the judgment, but subsequently rescind the order of affirmance and dismissed the appeal. This action w final, ended the case in that court, and deprived it of all power add to or alter the record as certified. Since there was no c pending power was wanting to make any order granting leave the court below for any purpose. The attempt by remanding t record with leave to the court below to take action which woul otherwise have been beyond its powers left the matter precisely if no such order had been made.

It follows that the Circuit Court correctly held that what w done subsequent to the affirmance of the judgment in the fi appeal was improvident and unauthorized and should be r scinded, and the order which accomplished this end and reinstat the original judgment is

Affirmed.

Mr. Justice STONE took no part in the consideration or decisio of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.